No. 406.

Brief of Crane for D. E.

Filed Jan. 17, 1898.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1897.

No. 406.

THE HOUS[illegible] & TEXAS CENTRAL RAILROAD COMPANY [illegible] DERICK P. OLCOTT, ET AL., PLAINTIFFS IN ERROR.

vs.

THE STAT[illegible] OF TEXAS, DEFENDANT IN ERROR.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT OF TEXAS.

BRIEF OF DEFENDANT IN ERROR.

M. M. CRANE, ATT'Y.-GEN'L.
Counsel for the State of Texas, Defendant in Error.

EUGENE VON BOECKMANN PUBLISHING CO., AUSTIN, TEXAS

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1897.

No. 406.

THE HOUSTON & TEXAS CENTRAL RAILROAD COMPANY, FREDERICK P. OLCOTT, ET AL., PLAINTIFFS IN ERROR.

vs.

THE STATE OF TEXAS, DEFENDANT IN ERROR.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT OF TEXAS.

BRIEF OF DEFENDANT IN ERROR.

I have seen no copy of the brief of plaintiffs in error. I therefore cannot determine whether the statement of the case made by them is correct or not. In lieu thereof, therefore, I submit the statement made by the District Judge who tried the case in the court below, with this prefatory addition—that the case was tried in April, 1893, on the trial of which the District Judge made the following statement which I adopt as my own:

"This is a suit by the State, through its Attorney General, J. S. Hogg, against the Houston & Texas Central Railway Company, Fred. P. Olcott, and George E. Downs, to recover sixteen sections of land, each containing six hundred and forty acres, situated in Nolan County; suit filed February 3, 1890. George E. Downs files a disclaimer.

"The court finds the following facts, viz:

"1. That a special act was passed by the legislature of the State of Texas, approved March 11, 1848, incorporating the Galveston & Red River Railway Company. By said act said company was authorized to construct a railroad from a point on Galveston Bay or its contiguous waters to a point on Red River, with the privilege of constructing and maintaining branches. There was no land grant coupled with this act of incorportion.

"2. That a special act was passed by the legislature, approved February 14th, 1852, supplementary to the above act, in which it was provided that eight sections of land of 640 acres each should be granted to said company for every mile of railroad actually completed and ready for use.

"3. That a special act was passed by the legislature, approved January 23rd, 1856, supplementary to the several acts incorporating said company, in which it was provided that if said company completed its first twenty-five miles of road, commencing at the city of Houston, within six months after January 30th, 1856, its failure to complete any portion of its said road before said date should not operate as a forfeiture of any of its rights, and that said company would then be entitled to its rights, benefits, and privileges granted by an act approved January 30th, 1854, entitled 'An act to encourage the construction of railroads in Texas by donations of lands,' and it was further provided in said special act 'that nothing in this act shall be so construed as to affect the right of the State to repeal or modify the act of January 30th, 1854.' By this special act also the said company was authorized to issue bonds and to mortgage all of its property.

"4. That by virtue of a special act of the legislature approved September 1st, 1856, the name of the company was changed to the 'Houston & Texas Central Railway Company.'

"5. That a special act was passed by the legislature and approved February 4th, 1858, providing that the failure of the Houston & Texas Central Railway Company to complete the third section of twenty-five miles of its road by the 30th of July, 1858, should not work a discontinuance of the benefits conferred by any general laws of the State of Texas in reference to railroads, provided the third section should be completed by

July 30th, 1859. This act contains a proviso 'that the benefits of the provisions of any general law shall only accrue to the said railroad company whilst said law shall remain in force.

"6. That on the 25th day of November, 1862, the said railway company, by its board of directors, passed a resolution by which the original *bona fide* stockholders of said company would be restored to their rights in said company upon the payment into the treasury of said company of 10% upon their said stock in accordance with the provisions of the acts of the 11th day of January, 1862; that under and by virtue of said resolution, said stockholders were accorded all rights contemplated by said law, and many stockholders took advantage thereof. A copy of said resolution was never forwarded to the governor of Texas.

"7. That a special act was passed by the legislature and approved September 21st, 1866, which provided, among other things, that the said Houston & Texas Central Railway Company shall construct and put in running order a section of twenty-five miles of additional road to that now built, within one year from January 1st, 1867, or fifty miles within two years from that date, and such grant of land (sixteen sections to the mile granted in the act) shall be discontinued when said company shall fail to construct and complete at least twenty-five miles of the road contemplated by their char'er each year after the construction of said first mentioned fifty miles of road, provided that said road shall be put in running order to Bryan station and cars running regularly thereon by the 1st day of September, 1867. This and the other special acts granting lands to said railway company provided the manner of procedure by which it could procure certificates for the land due to it.

"8. That a special act of the legislature of date August, 1870, provides that 'no forfeiture of any of the rights or privileges secured to it by existing laws shall be enforced against the said Houston & Texas Central Railway Company by reason of its failure to comply with the conditions as to construction imposed by the first section of the act of the 21st of September, 1866, entitled 'An act granting lands to the Houston & Texas Central Railway Company,' but the said company shall have and enjoy all of the rights and privileges secured to it by existing laws the same as if the conditions embraced in the first section of said act

of the 21st of September, 1866, had been in all respects complied with,' with a proviso which was complied with.

"9. That on the 1st day of January, 1865, the terminus of said railroad was at Millican, in Brazos County.

"10. That the fourth section of twenty-five miles of said railroad terminating at Bryan, was completed August 27, 1867.

"11. That the fifth section of twenty-five miles of said railroad was completed on or before June 15th, 1869.

"12. That the sixth section was completed on or before August 17th, 1870.

"13. That the seventh section was completed on or before July 15th, 1871.

"14. That the eighth section was completed to Richland Creek on the 26th of September, 1871.

"15. That by an act of the legislature approved February 2, 1856, the Washington County Railroad Company was chartered for the purpose of constructing a railway from some point on the track of the Galveston & Red River R. R., crossing the Brazos River within the limits of Washington County, and then running in the most suitable direct line to Brenham, in said county. The said company was organized and constructed its road from Hempstead, in Waller County, to Brenham, in Washington County, a distance of about 25 miles.

"16. That by the act of the legislature passed August 25th, 1870, the Washington County Railroad was merged in and became a part of the Houston & Texas Central Railway. This latter railway was authorized by said act to extend the Washington County Railroad from Brenham to the city of Austin.

"17. That the Houston & Texas Central Railway received from the State of Texas 540 land-scrip certificates for 640 acres each, all of which have been located and surveyed on public domain; that each and all of these certificates, in which are included the ones involved in this suit, were issued for and upon that portion of defendant's line of railroad extending from the city of Brenham to the city of Austin.

"18. That the defendant's main line of track from Brenham to Austin, mentioned in each of said certificates, is $93\frac{3}{76}$ miles, and the sidings and switches at and between the same points is $2\frac{5}{6}$ miles.

"19. That the lands described in plaintiff's petition were located and are now held without patents by the defendants, by virtue of said certificates, according to the number and description set forth in said petition.

"20. The sections of defendant's line of railway from Brenham to Austin were completed, respectively, 1st, on January 20th, 1871; 2nd, on September 15th, 1871; 3rd, on November 26th, 1871, and 4th, completed to Austin on 25th of December, 1871.

"21. That the defendants paid taxes on the land sued for continuously since they were located up to the present time.

"22. That the defendants paid all fees of locating and surveying the lands sued for, as well as for the same number of alternate sections for the public free school fund.

"23. That the various engineers appointed by the different governors to inspect railroads, as the same were constructed, in their respective reports of inspection, stated the number of miles and feet of main track, the number of miles or feet of sidings. The action of the respective governors, except Governor Roberts, on said report, was usually in the following words: 'Report examined and approved,' upon which reports and action of the governors the commissioners of the general land office issued to the respective companies certificates for main track and sidings in form such as is shown by the record during the administration of Governor Roberts. He approved for only the number of miles of main track stated in the report. In one instance Governor Davis approved a report of sidings exclusively, for which certificates were issued in usual amount per mile. This was done in one instance also by Governor Hubbard, for which certificates were issued. Governor Hubbard, on one of the reports, endorsed: 'This report of Inspector Gray examined and approved for 30 miles main track and sidings as being made, graded, and in all respects complying with the law.'

"24. That the lands sued for and described in plaintiff's petition are situated in Nolan County, Texas, in what is known as the Pacific reservation, created by special act of the legislature of date May 2, 1873, entitled 'An act to adjust and define the rights of the Texas & Pacific Railway Company within the State

of Texas,' etc., and the same were located and surveyed, fourteen of them on June 1st, 1873, and two of them on June 7th, 1873.

"25. That the sixteen certificates, by virtue of which the land sued for was located, were issued by the Commissioner of the General Land Office on July 1st, 1872, after the road from Brenham to Austin had been completed and put in running order, and after John W. Glenn, civil engineer and commissioner for the State, had reported to the governor of the State that the Houston & Texas Central Railway Company had complied with the provisions of its charter and of the general laws of the State of Texas relating to the construction of railroads.

"26. That since the location of said lands, they have been platted upon the map in use at the general land office of the State of Texas, and recognized by the land commissioners as the Houston & Texas Central Railway Company's lands.

"That on the 26th day of May, 1886, in consolidated cause No. 198 of the equity docket of the Circuit Court of the United States, for the eastern district of Texas, entitled 'Nelson Easton and James Rintoul, trustees, and the Farmers' Loan & Trust Company, trustee, vs. The Houston & Texas Central Railway Company, et al.,' Charles Dillingham, Nelson S. Easton and James Rintoul were duly appointed receivers of all the land franchises, and property of every nature of said railway company.

"That on December 7th, 1888, by an order of said Circuit Court said Easton and Rintoul were relieved from further duty as such receivers, and Charles Dillingham was continued as sole receiver until the property of said railway was turned over to the purchaser thereof.

"That at a sale duly authorized by said Circuit Court, which took place in the city of Galveston on the 8th day of September, 1888, the defendant, F. P. Olcott, became the purchaser of the property of every kind and description of the Houston & Texas Central railway, including the lands in controversy.

"That said receiver, Dillingham, duly executed to said F. P. Olcott a deed to said property, including the land in controversy.

"That the Houston & Texas Central Railway Company, as a

further assurance to the purchaser, intervened and joined in said deed by its duly authorized officer.

"That said sale was duly confirmed by the court on the 8th day of January, 1889.

"That the lands in controversy, as well as all other property of the railway, had been mortgaged by it, and the said sale was ordered for the purpose of paying off the mortgages.

"CONCLUSIONS OF LAW.

"1. That this suit having been brought for the sole purpose of determining the question of title to the lands in controversy between the State of Texas and the defendants, said railway company and Olcott, the same can be maintained for said purpose, notwithstanding the fact that said railway company and lands in controversy are still in the custody of a receiver appointed by the Federal Court, and that this suit is brought without the permission of the Federal Court.

"2. That the sale of the lands in controversy to F. P. Olcott and the deed executed to him were effected to convey him all title and interest in and to said lands then owned by said railway company.

"3. That the resolution passed on November 25th, 1862, by the board of directors of the Houston & Texas Central Railway Company, restoring its stockholders to their rights, etc., was a substantial compliance with the requirements of the act of June 11th, 1862, and a failure to file a copy of said resolution with the governor would not deprive said company of the benefits of said act.

"4. That under and by virtue of the special act approved January 23rd, 1856, the State had the right to repeal the act of January 30th, 1854, granting lands to railroads in so far as the same affected the Houston & Texas Central Railway.

"5. That the special act approved February 4th, 1858, in so far as the same could have been held to grant land to the Houston & Texas Central Railway Company, ceased to be operative at the time the act of January 30th, 1854, granting lands to railroads, expired by limitation.

"7. That the effect of the act approved January 11th, 1862,

extended the operation and life of the act of January 30th, 1854, until two years after the close of the war, which was May 28th, 1865. This last named act therefore expired by limitation on the 28th of May, 1867, unless kept in force by the act approved November 13th, 1866.

"8. That the act approved November 13th, 1866, is in conflict with the Constitution of 1866 and previous Constitutions of the State, and is therefore null and void.

"9. That the Houston & Texas Central Railway can not claim these lands under the special act of September 21st, 1866, granting 16 sections to the mile, for the reason that it failed to comply with the provisions of that act, that it should build fifty miles of road within two years from January 1st, 1867, and seventy-five miles within three years from that date. The company had therefore lost the right to earn land under that act.

"10. That the act of August 15th, 1870, enacted after the adoption of the Constitution of 1869, which repealed the act of September 30th, 1854, was in conflict with that constitution and therefore null and void.

"11. That the defendant F. P. Olcott, having taken title under the certificates, no patents having been issued, is affected with notice of their invalidity under the Constitution of 1869.

"12. The foregoing conclusions rendered it unnecessary to determine whether the special law entitled 'An act to adjust and define the rights of the Texas & Pacific Railway Company in the State of Texas, in order to encourage the speedy construction of a railway through the State to the Pacific ocean,' approved May 2nd, 1873, is or is not constitutional.

"13. Judgment will be rendered for the plaintiff for the land in controversy and for costs.

"To which defendants except." (Record, pp. 28–33).

From that judgment, plaintiffs in error appealed to the Court of Civil Appeals for the Second Supreme Judicial District of Texas, and the case was by that court affirmed on May 9th, 1896. (Record, pp. 95–7). The Court of Civil Appeals adopted the statement of the case made by the trial court in so far as the conclusions of facts were involved, and held as a matter of law that the certificates under which plaintiffs in error claim the

land were void, because at the date of their issuance, the State Constitution of 1869 had been adopted, and plainly prohibited them. A motion for a rehearing was made by plaintiffs in error in that court, and overruled. They then sought to remove the case to the Supreme Court of the State by a writ of error, but the application for a writ of error was denied. He has therefore sought this court assigning the following errors:

"First.—The said Court of Civil Appeals erred in overruling and in holding not well taken appellants' first and sixth assignments of error, which complained of the action and ruling of the court below in overruling and denying petitioners' plea to the jurisdiction of said court, based upon the ground, in effect, that all the land sued for was at the time in the custody and possession of the Circuit Court of the United States in and for the Eastern District of Texas, at Galveston, in consolidated cause No. 198, on the equity docket of said court, entitled, 'Nelson E. Easton and James Rintoul trustees, and the Farmers' Loan & Trust Company, trustee, vs. The Houston & Texas Central Railway Company, et al,' through Charles Dillingham, the receiver of said Circuit Court in said cause, and this suit was instituted without permission of said court, and in deciding that notwithstanding such facts the District Court of Nolan County had jurisdiction in this cause.

"Second.—The said Court of Civil Appeals erred in overruling and holding not well taken appellants' second assignment of error, complaining, in effect, of the action and ruling of the court below in overruling and denying and holding not well taken petitioners' plea in abatement, based upon the ground, in effect, that Charles Dillingham, the receiver of the Circuit Court of the United States in and for the Eastern District of Texas, in the cause above mentioned, was a necessary and proper party to this suit, because all the property sued for was in his custody and possession as such receiver.

"Third.—The said Court of Civil Appeals erred in overruling and holding not well taken appellants' seventh, fourteenth, seventeenth and twenty-first assignments of error, and in deciding that the acts of the legislature of the State of Texas, approved March 11th, 1848; February 14th, 1852; February 7th, 1853; January 30th, 1854; January 23rd, 1856; September 1st, 1856; Febru-

ary 8th, 1862; January 11th, 1862; September 21st, 1866; November 13th, 1866; August 15th, 1870, and the declaration of the constitutional convention of the State of Texas passed August 29th, 1868, and the acceptance of said laws and the construction by plaintiff in error, at large expense, of an important part of its lines of railway prior to the adoption of the Constitution of 1869, and the completion of its entire line subsequently in due time, did not constitute a valid contract between the State of Texas and said railway company entitling said railway company and creating in it a vested right to the lands granted by said laws and earned by said railway company thereunder, including the lands involved in this suit, and in holding, in effect, that said contract could be and was impaired, and the right of plaintiffs in error to said land was divested by the Constitution of the State of Texas, adopted in 1869, contrary to and in violation of the Constitution of the United States, and especially article 1, section 10, thereof, and section 1 of article 14 of the amendments thereof.

"Fourth.—The said Court of Civil Appeals erred in not deciding that the acts of the legislature of the State of Texas approved March 11th, 1848; February 14th, 1852; February 7th, 1853; January 30th, 1854; January 23rd, 1856; September 1st, 1856; February 8th, 1862; January 11th, 1862; September 21st, 1866; November 13th, 1866; August 15th, 1870, and the declaration of the constitutional convention of the State of Texas passed August 29th, 1868, and the acceptance of said laws and construction by plaintiff in error railway company, at large expense, of an important part of its lines of railway prior to the adoption of the Constitution of 1869, and the completion of its entire line subsequently in due time, constituted a valid contract between the State of Texas and said railway company entitling said railway company and creating in it a vested right to the lands granted by said laws and earned by said railway company thereunder, including the lands involved in this suit, and in not holding that said contract could not be and was not impaired, and the rights of plaintiffs in error were not divested by the Constitution of the State of Texas adopted in 1869, and that in so far as said State constitution attempted to impair such contract and divest such right, the same was and is contrary to and

in violation of the Constitution of the United States, and especially article 1 of section 10 thereof, and section 1 of article 14 of the amendments thereof, and therefore void.

"Fifth.—The said Court of Civil Appeals erred in affirming the judgment of the District Court of Nolan County, whereby the State of Texas had and recovered the said land from plaintiffs in error, and in not reversing the said judgment."

FIRST COUNTER-PROPOSITION UNDER FIRST AND SECOND ASSIGNMENTS OF ERROR.

The receiver, Dillingham, was not a necessary party to the suit between the State of Texas and the Houston & Texas Central Railroad Company; for the reason that he had sold the land, the sale confirmed, the deeds delivered and recorded, and he could not have been held to have been in possession.

Statement: The receiver, acting under an order of court, had sold the land in controversy. The sale had been confirmed, the deeds delivered and recorded. (Record, p. ——.)

Authorities:

Texas Code of 1895, Arts. 5252-5254.
State vs. W. L. & C. Co., 73 Texas, 453.
H. & T. C. R. R. and Olcott vs. State of Texas, 89 Texas, 300.

Argument: This suit was a statutory action of trespass to try title. The provisions of the Texas Code governing such actions are in the following language:

"Art. 5252. When a party is sued for lands the real owner or warrantor may make himself, or may be made a party defendant in the suit, and shall be entitled to make such defense as if he had been the original defendant in the action.

"Art. 5253. When such action shall be commenced against a tenant in possession the landlord may enter himself as the defendant or he may be made a party on motion of such tenant, and he shall be entitled to make the same defense as if the suit had been originally commenced against him.

"Art. 5254. The defendant in the action shall be the person in possession if the premises are occupied, or some person claiming title thereto in case they are unoccupied."

The Supreme Court of the State in passing on this question, uses the following language:

"The land in controversy was not occupied by any one, and the defendants did not claim to hold it as tenant of the receiver of the Houston & Texas Central Railroad, nor was the receiver bound to them or either of them in the character of warrantor. If he had been either it would not have been necessary for the plaintiff to make him a party defendant to the suit, but he might have been a party at the instance of the defendant or on his own motion.

"When the State instituted this suit it presented to the defendants an issue of title, and if they did not claim title to the land they should have entered their disclaimer; by filing a plea of not guilty they joined issue with the State upon the question of title. The fact that a third person claims title to the land in controversy will not entitle the defendants in the suit to have such third person made party thereto if the defendant does not claim as tenant of such third person." (89 Texas, 300-301.)

SECOND COUNTER-PROPOSITION UNDER ABOVE ASSIGNMENTS.

By the order of the court authorizing the sale of the land in controversy, the sale by the receiver, the report thereof, and the confirmation of the sale, the delivery of the deed conveying the land to Olcott, his acceptance thereof as evidenced by the recording of the deed in the several counties in which the land was situated, and the payment of the purchase money receipted in said deed, all title to the land in question was divested out of the defendant company, and thereby vested in F. P. Olcott. Until the sale or order confirmatory thereof shall be set aside and annulled, the legal title and right of possession must remain in Olcott.

Authorities:

Koontze vs. Northern Bank, 16 Wall., 200-203.
Russell vs. Railway, 68 Texas, 653.
Beach on Receivers, Sec. 516.
Walker vs. Morris, 14 Ga., 323.

THIRD COUNTER-PROPOSITION UNDER ABOVE ASSIGNMENTS.

Under the facts above stated, if the receiver had any kind of possession of the land, his possession must have been that as the agent of Olcott, the purchaser, and not as the arm of the court or receiver, because the receivership, in so far as this land was involved, was at an end.

Authorities:

Ry. Co. vs. Johnson, 76 Texas, 421.
Ry. Co. vs. Gay, 86 Texas, 571.
Hickox vs. Holiday, 29 Fed. Rep., 226.
Very vs. Watkins, 23 How., 469.
Beach on Receivers, Sec. 517.

FOURTH COUNTER-PROPOSITION UNDER ABOVE ASSIGNMENTS.

In order to make the receiver a proper co-defendant with the Houston & Texas Central Railway Company, some right to relief at the receiver's hands should be stated, and some relief prayed as against him.

Authorities:

High on Receivers, Sec 259.
Arnold vs. Suffolk Bank, 27 Barb., 424.

Tracy vs. Nat'l. Bank of Selma, 37 N. Y., 523.
Wilson vs. Wilson, 1 Barb. Ch., 592.
Beach on Receivers, Sec. 708.
Patrick vs. Eells, 30 Kan., 680.
N. P. Bank vs. Goddard, 20 N. Y. Sup., 526.

FIFTH COUNTER-PROPOSITION UNDER ABOVE ASSIGNMENTS.

The receiver himself should make application to be joined as defendant with the corporation over which he has been appointed; and the refusal of such an application made by the corporation is not error. The plaintiff is not bound to bring in the receiver.

Authorities:

Beach on Receivers, latter part of Sec. 708.
Mercantile Ins. Co. vs. James, 87 Ill., 199.
Mercantile Trust Co. vs. Pittsburg, 29 Fed. Rep., 732.

SIXTH COUNTER-PROPOSITION UNDER SAID ASSIGNMENTS.

The application to abate the suit came too late, because it was a year after the issue had been joined.

Statement: The facts are as stated above. (Record, p——).

Authorities:

Elkhart Car Works Co. vs. Ellis, 113 Ind., 215.
Hubbell vs. Dana, 9 How. Pr. (N. Y.), 424.

SEVENTH COUNTER-PROPOSITION UNDER SAID ASSIGNMENTS.

The equitable rule of comity invoked has no application to the facts of this case. It only applies where the suit is against the receiver, or where his possession is disturbed or sought to be disturbed. This suit was against Olcott and the railroad company, but not against Dillingham, nor did it seek to disturb his possession, if possession he had.

Authorities:

Gluck & Becker, Receivers, Sec. 35.

EIGHTH COUNTER-PROPOSITION UNDER ABOVE ASSIGNMENTS.

It was not necessary to get leave of the court to sue Olcott and the company, because Olcott and the company were not within the jurisdiction of the court.

Authorities:

Bethel vs. Bank, 14 Wall., 383.
Pringle vs. Woodworth, 90 N. Y., 502.
Gluck & Becker, Receivers, 26, 27, 82, 83.
24 U. S. Stat. at Large, 554.

FIRST COUNTER-PROPOSITION UNDER THIRD ASSIGNMENT OF ERROR.

The Court of Civil Appeals did not err in holding that the acts of the Texas legislature approved March 11th, 1848, February 14th, 1852, February 7th, 1853, January 30th, 1854, January 23d, 1856, September 1st, 1856, February 8th, 1862, January 11th, 1862, September 21st, 1866, November 13th, 1866, and August 15th, 1870, did not constitute a contract between the State and the defendant, authorizing it to build a branch road from Brenham to Austin.

Statement: The act of 1848 chartered a railroad corporation to be known as the "Galveston & Red River Railway Company." (See Special Acts of the Texas Legislature of 1848, p. 370.) By the express terms of the charter no grants of land were made or promised. Section 2 of the charter marks out the line of the road authorized to be constructed. It reads as follows:

"That the said company may be and is hereby invested with the right to make, own and maintain a railway from such point on Galveston Bay, or its contigious waters, to such point on the Red River between the western boundary line of Texas and Coffee's Station as the said company may deem most suitable, with a privilege of making, owning and maintaining such branches to the railway as they may deem expedient." Special Acts of 1848, 370.

In 1852 the charter was amended, by striking out the fourth and all subsequent sections, and substituting eighteen other sections instead. Section 14 of the act provided for a grant of land. It reads as follows:

"There shall be granted to said company eight sections of land of six hundred and forty acres each, for every mile of railway *actually completed by them and ready for use;* and upon the application of the president of the company, or any duly authorized agent thereof, stating that any section of five miles, or more of said railway *has been completed and is ready for use*, it shall be the duty of the Comptroller of Public Accounts to require the State Engineer, or a commissioner to be appointed by the governor, to examine said railway, and upon his certificate that said section of said railway *has been completed in a good and substantial manner, and is ready for use*, the Comptroller shall give information of that fact to the Commissioner of the General Land Office, whose duty it shall be to issue to said company, land certificates to the amount of eight sections of land, of six hundred and forty acres each, *for each and every mile of railway thus completed and ready for use;* such certificates shall be for six hundred and forty acres each, and shall be located upon any unappropriated public domain of the State of Texas, within twelve months from the issuing thereof, which date shall appear upon the face of each certificate; and upon the return of the field notes of any survey made by virtue of any certificate thus issued, it shall be the duty of the Commissioner of the General Land Office to issue patents to said company in their corporate name; one-fourth of which said lands *thus patented* shall be alienated by the company in six

years; one-fourth in eight years, one-fourth in ten years, and the other fourth in twelve years, so that the whole of the lands thus granted shall pass from the hands of the company within twelve years from the date of the patents thus issued." (Special Acts of 1852, pp. 142, 145-6).

It will be noted that Section 14 requires the road to be completed by sections of five miles each, and when completed and ready for use, the land certificates are to be granted for such sections.

In 1854 the legislature of Texas passed a general law to encourage the construction of railways in Texas by donations of land. Section 2 of said act reads as follows:

"That any railroad company having actually put under contract as much as twenty-five miles of its road, or its entire road when the length may not exceed twenty-five miles, upon filing a certified copy of such contract with the Commissioner of the General Land Office, and upon depositing with the Treasurer of the State a bond with two or more good sureties, to be approved by him in favor of the governor of the State, in the sum of ten thousand dollars, conditioned as hereinafter required, may file an application with any district surveyor of any land district in this State, a copy of which application shall in all cases be forwarded to the Commissioner of the General Land Office by the district surveyor to survey any quantity of the public domain lying and being in such district, and subject to location and entry, not to exceed eight hundred sections, and said application shall specifically describe the lands applied for and intended to be surveyed; and if said company shall produce and file with the district surveyor a certificate of the Commissioner of the General Land Office that a copy of its contract has been filed in said office for the construction of twenty-five miles or more of said road; and also a certificate from the Treasurer that a bond as required by this act has been deposited in his office, said application shall exempt the land so designated from any future location, entry or pre-emption privilege, until otherwise directed as hereinafter provided; provided, that no application for a survey of lands under the provisions of this act, shall be made for more than six months before the completion of such section; and if said section be not completed and notice thereof given as herein provided, within six months from the time of the application, then such land applied for shall become subject to location and entry as if no such application had been made."

Section 6 of the act, like the charter of the Galveston & Red River Railroad Company, reads as follows:

"That any railroad company *having completed and put in running order a section of twenty-five miles or more* of its road may give notice of the

same to the Governor, whose duty it shall be to appoint some skillful engineer, if there be no State engineer, to examine said section of road, and if upon the report of said engineer, under oath, it shall appear that said road has been constructed in accordance with the provisions of its charter, and of the general laws of the State in force at the time regulating railroads, thereupon it shall be the duty of the Commissioner of the General Land Office to issue to said company patents for the odd sections surveyed in pursuance of the second and third sections of this act; but in case said lands or any part thereof shall not have been surveyed at the time said section is completed, then it shall be the duty of said Commissioner to issue to said company certificates of 640 acres each, equal to sixteen sections per mile of road so completed, whereupon said company may apply to the district surveyor of any land district in this State, to survey any quantity of vacant land subject to location and entry in such district, not to exceed twice the quantity of certificates so issued, which surveys shall be made, numbered and colored as directed in the third section of this act, and upon the return of the field notes and map or maps of such surveys to the general land office, and the certificates so issued, it shall be the duty of the Commissioner to issue to said company patents for the odd sections of said surveys; provided, that in case the surveys are not applied for before the completion of any section of road, it shall not be necessary to deposit with the Treasurer a bond as required in the second section of this act."

Section 12, so far as applicable, reads as follows:

"That the provisions of this act shall not extend to any company receiving from the State a grant of more than sixteen sections of land, *nor to any company for more than a single track road, with the necessary turnouts;* and any company now entitled by law to receive a grant of eight sections of land per mile for the construction of any railroad, excepting the provisions of this act, *shall not be entitled to receive any grant of land for any branch road;* provided, this act shall not be so construed as to give to any company now entitled by law to receive eight sections of land more than eight additional sections; provided, that no person or company shall receive any donation or benefit under the provisions of this act, unless they shall construct and complete at least twenty-five miles of the road contemplated by their charter within two years after the passage of this act; and such donations shall be discontinued in every case where the company or companies shall not construct and complete at least twenty-five miles of the road contemplated by their charter, each year after the construction of said first-mentioned twenty-five miles of road. (General Laws of 1854, pp. 11-15.) This act shall continue in force for ten years and no longer."

It will be noted that by the express terms of the Act of 1854, the appellant company, if it claimed anything under that general law, was not entitled to any land for any branch road.

In 1856 the Washington County Railroad was chartered, with authority to build a road from a point on the Galveston & Red River Railway to Brenham, Texas, and it constructed a line of railroad from that point to Brenham. (Special Acts of 1856, pp. 49-53.)

In 1856 an act was passed for the relief of the Galveston & Red River Railroad Company, and supplementary to the several acts incorporating said company. Time was given in which it should complete a section of twenty-five miles of said railroad, it being extended for six months after the 30th of January, 1856. It was further authorized to borrow money. Section 5 of said act reads as follows:

"That said railroad company in accepting the benefits of this act shall yield all general branching privileges except such as are expressly granted by the provisions of its charter to certain points, and shall be required to spend only so much of its capital stock upon any branch as shall be expressly subscribed to such branch," etc.

Section 6 reads as follows:

"That nothing in this act shall be so construed as to effect [affect] the right of the State to repeal or modify the Act of January 30th, 1854, entitled 'An act to encourage the construction of railroads in Texas by donations of land;' provided, that the right to lands acquired before said repeal or modification, shall in all cases be protected." (Special Acts of 1856, pp. 28-30.)

All of the acts in question, and particularly the original charter, required the certificates to be located on unappropriated public domain. This special act above cited is pleaded by plaintiff, and is in part the act upon which the assignment of error is based.

In 1856 the legislature passed another act in which it authorized the Galveston & Red River Railroad Company to change its name to the Houston & Texas Central Railroad Company. (Special Acts of 1856, p. —.)

Time was extended to the railroad company for the completion of certain sections of its road by special act of February, 1858. Section 27 of said act, extending said time, reads as follows:

"The failure of the Houston & Texas Central Railroad Company to *complete* the third section of twenty-five miles of its road by the 30th day of

July, 1858, shall not work a discontinuance as to the said company of the benefits of the act entitled 'An act to increase the construction of railroads in Texas by the donation of land,' or any of the general laws in reference to railroads, if said company shall complete said third section by the 30th day of July, 1859. And that on the *completion* of the subsequent sections of twenty-five miles annually after the said 30th day of July, 1859, or fifty miles every two years, said company shall be entitled to 16 sections of land per mile as contemplated in said last mentioned act, for each section so *completed;* and whenever a failure shall occur on the part of the said company to *complete* a section within the time required, then the land applicable to that section only shall be forfeited, and the *completion* of future sections within the time contemplated by law, shall entitle the company to the benefits of said last mentioned act as fully as if no failure has been made in *completing* any former section, except as to the section on which the failure occurred; provided, that *the benefits of the provision in the general law shall only inure to the said company while said laws shall remain in force.*"

In 1866 another act granting the railroad relief and extending the time in which to complete its sections and put them in running order was passed. In so far as applicable, it reads as follows:

"That the Houston & Texas Central Railway Company shall be entitled to receive from the State a grant of sixteen sections of land, of six hundred and forty acres each, for every mile of road it has constructed, or may construct, and put in *running order*, 'in accordance with the provisions of the charter of said railroad company;' provided, that the lands heretofore drawn by said company by virtue of an act to encourage the construction of railroads in Texas by donations of lands, approved January 30th, 1854, be deducted from the amount of land granted hereby. And provided further, that the land certificates heretofore issued to this company, on the three first sections of their road, by virtue of the act aforesaid, be included in the terms, benefits and conditions of this act, as if issued by virtue of its provisions; and further provided, that said company shall construct and put in *running order* a section of twenty-five miles of additional road to that now built within one year from January 1st, 1867."

This act in express terms simply extended the Act of 1854 which otherwise would have expired by limitation.

It will be noted that by the terms of all of these acts it gave to the railroad company a certain amount of land to the mile for *complete* sections.

It should also be stated that the Houston & Texas Central Railroad Company became the owner of the Washington County

Railroad Company, above mentioned. The purchase was authorized by act of the legislature.

In 1869, the people of Texas adopted a new constitution, known as the "Reconstruction Constitution." Section 6, Article X, of that instrument reads as follows:

"The legislature shall not hereafter grant lands to any person or persons, nor shall any certificates for land be sold at the land office, except to actual settlers upon the same, and in lots not exceeding one hundred and forty acres." (Sayles' Texas Statutes, Vol. 4., p. 444.)

It must be observed that by the terms and conditions of the several acts previously quoted, the Houston & Texas Central Railway Company, as the successor of the Galveston & Red River Railroad Company, was not authorized to earn any lands on any branches of its road except as specifically stated. The right to build branches other than as theretofore specially stated was relinquished in accepting the provisions of the several relief acts above mentioned. This is the attitude in which the matter stood when the constitutional provision of 1869 became the organic law of the State.

On August 15th, 1870, the legislature passed another act for the relief of the Houston & Texas Central Railway Company, which recited the fact of the purchase of the Washington County road by the Houston & Texas Central Railway Company. The first section of the act reads as follows:

"That the Washington County Railroad is hereby made and declared to be, to all intents and purposes in law, a part of the Houston & Texas Central Railway, and shall be under the control and management of the Houston & Texas Central Railway Company in like manner as every other part of the said railway, and the Houston & Texas Central Railway Company shall have the right to build and extend the part of its railway heretofore known as the Washington County Railroad from the town of Brenham, in the county of Washington, to the city of Austin, in the county of Travis, by the most eligible route to be selected by the engineers of the company. * * *

And the said Houston & Texas Central Railway Company, by reason of the construction of said railway from the town of Brenham to the city of Austin, * * * shall have and enjoy the rights, privileges, grants and benefits that are now, or may at any time hereafter be secured to any railway company in the State of Texas by any general laws of the State."

Under this act of the legislature the Houston & Texas Central Railway Company extended the Washington County road from Brenham to Austin within the time prescribed by the acts and the certificates, by virtue of which the land in suit was located, were regularly issued to the Houston & Texas Central Railway Company for the work done in extending that road.

It was contended in the court below that plaintiffs in error had a right to build the branch road from Austin to Houston by virtue of the act of February, 1853. That act, in so far as applicable, reads as follows:

> "Said company (meaning the Galveston & Red River Railroad Company) is also hereby further authorized and empowered to extend said railway to the city of Galveston, and also to make and construct simultaneously with said railway described in the original act establishing said road, a branch thereof towards the city of Austin, under the same restrictions and stipulations, provided in said original acts, and subject to the rights of the State; to regulate the tolls by general law."

Our Supreme Court held that it was not necessary to determine whether that act had been repealed or not, because it was unimportant. Attention was called to the fact that the Houston & Texas Central Railway Company could not have built the road from Brenham to Austin under the Act of 1853, because it would not have been a branch with its main line and having no connection therewith. The Galveston & Red River Railroad Company had no line of railroad at Brenham at that date. And this view is strengthened by the fact that the Houston & Texas Central Railway Company deemed the Act of 1870 necessary in order to authorize the construction of the line in question, and when it was sought to construct this line it was not sought to construct it as a part of the old Galveston & Red River Railroad Company, but it, in express terms provided, that the Houston & Texas Central Railway Company shall have the right to build and extend the part of its railway heretofore known as the Washington County Railroad from the town of Brenham in the county of Washington to the city of Austin, in the county of Travis. The Supreme Court of the State argued that as a matter of fact, the road was constructed under the authority granted by the Act of 1870, and not under any act previously passed.

Argument: The above statement has been made for the purpose of showing, first, that the Galveston & Red River Railway Company as originally chartered in 1848, did not contemplate the construction of the line of road in question; second, that the charter did not grant any land to the railroad company for the purpose of constructing its road. The amended charters did grant the amount of eight sections of land per mile, but these were superceded by the general Act of 1854 and its amendments, which gave sixteen sections per lineal mile; it was under this general act that the lands in question were claimed; third, that the right was retained by the legislature to repeal this general law at any time, and in which event the railroad company was to receive land certificates for sixteen sections of land per mile for each section of twenty-five miles of railroad actually constructed and put in running order; fourth, that the railroad from Brenham to Austin was not constructed under the Act of 1853, but under the special Act of 1870, and then not as a branch of its original line, but as a branch of the Washington County road; and fifth, that inasmuch as the Act of 1870 was not passed until after the adoption of the Constitution of 1869, which withdrew from the legislature the right to grant lands for the construction of railroads; that, therefore, the legislature had no right to give any land certificates for the construction of this particular branch of road in question, because the railroad from Brenham to Austin was to all intents and purposes a new road. It seems hardly necessary to say that the Constitution of 1869, above mentioned, repealed all existing laws in reference to the grant of lands to railroad companies. The Supreme Court of Texas has several times so held. In the case of the G. H. & S. A. Railway Co. vs. State, 81 Texas, 597, the court used this language:

"At the date of the act (meaning the Act of 1870), the power to grant lands in aid of the construction of railways had been taken from the legislature by the Constitution of 1869, and laws making such grants impliedly repealed, except as to existing rights."

In Bacon & Bates vs. Russell, 57 Texas, 416, the same court said:

"This section of the Constitution (meaning the one under discussion) evidently prohibited, not only the direct grant of land, but if prohibited every

step which could ultimate in a grant of land to other than an actual settler, and to such limited the grant to one hundred and sixty acres."

This is in line with other authorities. As an eminent text writer has stated it:

"In such cases a repeal is inferred from necessity if there be such conflict that the old and new cannot stand together." Southerland on Statutory Construction, Section 137.

"And then again it, in the nature of things (meaning repeal), would be so, not only on the theory of contention, but because contradictions cannot stand together." Southerland on Statutory Construction, page 180, and authorities there cited.

It has even been held that the adoption of a treaty where the stipulations are inconsistent with the State law is equivalent to a repeal of the State law. Dean ex demise, Frist v. Hamden, 1 Payne, 55.

Any other doctrine is absurd. Suppose the legislature had passed a law granting lands to railroad companies general in its nature just like the act of 1854, it would not of itself constitute a contract; this is the well settled rule. Christ's Church v. Philadelphia, 24 How., 300; East Saginaw Salt Company v. East Saginaw, 19 Mich., 259, 2 Amer. Rep., 82, 12 Wall., 373; Cooley on Constitutional Limitations, 347.

Now if afterwards the same legislature passes a general law and says that thereafter no lands shall be granted to the railroad company, that general law would certainly repeal by implication the statute formerly making the grant, except in so far as its terms had been accepted by railroad companies. If the legislature could repeal that statute by another statute, it is absurd to say that the people in their organic capacity cannot, by a constitutional provision, effect the same purpose. To hold otherwise is to say that the legislature, the agents of the people, can repeal by implication an act of the legislature what the people themselves in their organic capacity are powerless to effect by a constitutional provision containing the same in substance as the repealing statute. Surely the people must have as much power as the legislature, because the legislature can have no power except it be derived from the people whom they represent. We regard this question as definitely settled.

In addition to this the Supreme Court of Texas has held that the general law of January 30th, 1854, applied only to companies then chartered and for the construction of roads which their charters authorized them to build, as above shown. By the charter of the Houston & Texas Central Railway Company it was not authorized to build the road from Brenham to Austin at the date when the constitutional provision was adopted. Therefore, the general law of 1854, according to the Supreme Court of Texas had no application and conferred no right upon the company to earn lands for the construction of that piece of road. To the same effect is the case of Quinlan vs. H. & T. C. Ry. Co., 89 Texas, 377 and 378.

It should therefore be held that inasmuch as the act of 1854 did not grant lands to any railroad companies, except such as were then in existence and for roads that it had been authorized to build before the adoption of the Constitution of 1869, and that no land could be granted for the building of the road from Brenham to Austin, because they had no authority to build that road until after the adoption of the Constitution of 1869, and the legislature was prohibited from giving it lands for that portion of said road.

FIRST COUNTER-PROPOSITION UNDER FOURTH ASSIGNMENT OF ERROR.

Inasmuch as it has been heretofore shown that there was no contract between the State of Texas and the Houston & Texas Central Railway Company to give them any lands for the construction of the line of road from Brenham to Austin, that therefore, there was no contract to be impared and there is no merit in the fourth assignment of error.

Authorities:

Argument: It has been my purpose in the argument heretofore made to demonstrate that the State authorities had no

power to issue land certificates for the construction of the particular piece of road in question. But there is another reason why the plaintiffs in error should not have been permitted to recover. The lands sued for and described in plaintiff's petition are situated in Nolan County, Texas, in what is known as the Pacific Reservation, created by special act of the legislature of May 2nd, 1873, entitled "an act to adjust and define the rights of the Pacific Railway Company in the State of Texas," and the same were located and surveyed, fourteen of them on June 1st, 1873, and two of them on June 7th, 1873. (Record p. 31, Sec. 24.)

All of the acts in question authorizing the issuance of certificates provided in express terms that they shall be located on unappropriated public domain.

The Supreme Court of Texas have construed the statute above mentioned in cases in which title to the land was claimed to have been acquired by the Houston & Texas Central Railway Company. That company claimed to have filed by virtue of 240 certificates on land situated within the same reservation set apart for the Texas & Pacific Railroad Company. The question as to whether the land within the reservation had been appropriated by that reservation was discussed by the Supreme Court of Texas, and on that point said court used the following language:

"But we are of the opinion that the companies locations were not valid for the reason that at the time the lands were attempted to be appropriated by virtue of the certificates under which it now claims they were reserved from location by the act of May 2nd, 1873, which created and defined a reservation for the benefit of the Texas & Pacific Railway Company." Jumbo Cattle Company vs. Bacon & Graves, 79 Texas, 11.

It is clear, therefore, that in no event are the plaintiffs in error entitled to recover in this case; first, because the land certificates are void, having been issued for the purpose of making a land grant to a railroad company for road constructed after the State Constitution had prohibited such grants; and second, because the certificates thus issued were located on land which had been previously reserved from location and appropriated for the use of the Texas & Pacific Railway Company. It is

plain, therefore, that there is no merit in the twenty-fifth assignment of error which complains because the Court of Civil Appeals affirmed the judgment of the lower court.

It is therefore submitted that the case should be in all things affirmed.

M. M. CRANE, Atty.-Gen'l.
Counsel for the State of Texas, Defendant in Error.